IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 905 of 2005

WITH

CIVIL APPLICATION NO. 1059 of 2005

Bhavesh S. Shah .. Appellant

versus

Kapildev R. Gupta .. Respondents

...

Mr.Pankaj Shah for the appellant.

Mr.A.M. Saraogi for the respondents

CORAM : B.H. MARLAPALLE,J

DATED : 30th September 2005

P.C.:

1. This appeal arises from the order passed by the learned Judge of the City Civil Court on 25th July 2005 allowing Contempt Notice of Motion no.3416 of 2004 moved under Order XXXIX Rule 2A of the Code

of Civil Procedure.

2. Appeal from Order No.295 of 2003 came to be disposed off by this Court on the basis of the undertaking furnished by the appellant on 19th April 2003. The operative part of the said order reads as under:-

> "The Respondent-plaintiff has filed an undertaking stating therein that he shall provide all amenities as mentioned in the said undertaking within a period of specified therein. The undertaking is taken on record and marked "X" for identification. The undertaking is accepted. In view of this undertaking, the appeal from order stands disposed of since nothing further survives in the appeal."

3. It is contended by the learned counsel for the appellant that when the undertaking was furnished to this Court and if there was breach of

the said undertaking, there may be a case of contempt within the meaning of section 2(b) of the Contempt of Courts Act 19971 and the plaintiff would be required to file a Contempt Petition before this Court. He further submits that the trial Court would have no powers to entertain an application under Order XXXIX Rule 2A for the reason that the undertaking furnished to to this Court was breached wilfully.

4. It is pertinent to note that on failure of the appellant to implement the undertaking furnished before this Court, the plaintiff had approached by filing Civil Application no.1343 of 2004 in Appeal from Order No.295 of 2003 on or about 20th July 2004 and the said application came to be disposed of by this Court by its order dated 20th July 2004 reading as under :-

> "The Appeal from Order therefore came to be disposed of by order dated 19.4.2003 on the undertaking given by the appellant (original defendant). The original plaintiff has alleged breach of undertaking.

> It would be open for the plaintiff under Order 39 of the Code of Civil Procedure to move before appropriate forum to initiate action for breach of undertaking. In a disposed of appeal, the present application cannot be entertained.

It is pertinent to note that in Civil Application no.1343 of 2004, prayer clause (a) was regarding the contempt of this Court on failure to comply with the undertaking. It is thus clear that at the first instance, the plaintiff had approached this Court invoking its powers under the Contempt of Courts Act 1971 and vide the order dated 20th July 2004, this Court directed the plaintiff to move an application under Order 39 before the appropriate forum which means the trial Court. The contention of the learned counsel for the appellant that the trial Court entertained Notice of Motion no.3416 of 2004 without jurisdiction is therefore, unsustainable.

5. It is also evident from the record that the

present appellant had filed an application on or about 23rd September 2003 praying for extension of time to 19th October 2003 so as to implement the undertaking dated 19th April 2003 and by an order dated 12th December 2003, this Court had appointed a Commissioner to visit the premises and submit a report. The Court Commissioner who is the Section Officer of this Court submitted a report after visiting the concerned premises on 16th December 2003 and the report went to show that even as on that date, the appellant had not taken any steps to implement the undertaking dated 19th April 2003.

6. Mr.Saraogi, the learned counsel for the plaintiff states that even as on today, the building concerned is without a lift and under some pretext or the other, the appellant has failed to provide the lift during the last more than about two and half years.

7. The obtaining circumstances in this case do not permit the Court to take a lenient view against the appellant builder and the trial Court has rightly considered all the aspects and allowed the Notice of Motion holding the appellant guilty of

contempt. The sentence imposed i.e. one month Civil imprisonment with fine of Rs.10,000/- also can not be impeached. The learned counsel for the appellant submitted that he is ready to deposit the fine amount forthwith, but that itself cannot be a reason to admit this appeal and stay the order of sentence. The acts of the appellant as reflected in this appeal show that the appellant has no regards to the undertaking submitted by him before this Court and he persistently flouted the same under the garb of brazenly false please. I am therefore satisfied that this appeal fails at the threshold.

8. The appeal is hereby dismissed in limine. Civil Application does not survive.

B.H. MARLAPALLE, J